In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 507

CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT, et al.,
Appellants,

v.

JUDITH JAVA, et al.,
Appellees.

On Appeal from the United States District Court for the Northern District of California

Motion to strike the Brief for the United States as Amicus Curiae or in the alternative for leave to file a reply thereto

On January 12, 1971, three days before the filing date for appellees' brief and after that brief was at the printer, appellees were served with page proofs of the Brief for the United States as Amicus Curiae in support of appellants. The Court noted probable jurisdiction in this case on October 26, 1970; appellants' brief on the merits was filed on December 2, 1970, rendering all amicus curiae briefs filed in support of appellants due likewise on December 2. Rule 42(2). Thus, the brief filed by the United States

was 41 days late. No justification was offered for violating Rule 42(2), and no prior notice was given to appellees that a brief would be filed in the case by the United States.

The Court, by requiring amicus curiae briefs supporting appellants to be filed at the same time as appellants' own brief and at least thirty days before that of appellees, seeks to assure that the responding side will have time to adequately consider all arguments opposed to its position. The United States, which files many amicus curiae briefs each year with this Court, is surely aware of Rule 42(2) and of its purpose. By filing after appellees' brief was necessarily due at the printer, the United States precluded appellees from responding to its presentation.

The brief filed by the United States in violation of Rule 42(2) is not essential to the complete elucidation of appellants' position. Appellants themselves have filed a jurisdictional statement and a brief on the merits. They have the opportunity to file a reply brief as well. In addition, seven other briefs amici curiae were filed on behalf of appellants before the brief of the United States. Thus, the United States' brief is not only untimely but also unnecessary.

For the aforementioned reasons, appellees respectfully pray that this Court strike the Brief for the United States as Amicus Curiae. In the alternative, appellees seek leave to file the attached responsive Supplemental Brief.

Dated January 28, 1971

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Supplemental Brief of Appellees in response to the Brief for the United States as Amicus Curiae

The arguments of the United States proceed from a misunderstanding of both the California unemployment insurance disbursement procedure and the premises underlying appellees' statutory and constitutional challenge to that procedure. As discussed on pages 27-32 of appellees' principal brief on the merits [hereinafter Appellees' Brief], the California eligibility determination is not a screening process (Brief for the United States as Amicus Curiae at 8, 10, 16, 18 [hereinafter U. S. Brief]). Rather, as the court below found, it is the product of a

thorough factual investigation in which all interested parties are afforded an opportunity to be heard.[1] Appellees have never urged that unemployment benefits may not be suspended upon an employer's appeal merely because, under the California procedure, they are paid immediately upon the initial determination. Our position is simply that as soon as all parties have been heard and a prompt determination of eligibility made, the Social Security Act and the Due Process Clause both require the full payment of unemployment benefits.

Unlike the eligibility determination in California, an initial decision in Washington, D. C. is based solely upon information provided by the claimant. D. C. Code § 46-311. *See D. C. Compensation Board v. Hahn*, 399 F. 2d 987, 989-990 (D.C. Cir. 1968). In enacting the District of Columbia unemployment compensation law, Congress provided for a stay of benefits to allow an employer an opportunity to be heard,[2] thus recognizing that information from employers is essential to a meaningful decision. In passing the D. C. stay provision, however, Congress in no way condoned a delay of benefits for a median period of seven weeks *after* an employer has had an opportunity to be heard—the procedure obtaining in California under Section 1335 of the California Unemployment Insurance Code. *See* Appellees' Brief at 24, n. 18; Brief for the AFL-CIO as Amicus Curiae at 10.

Nor does the fact that Congress knew at the time it passed the Social Security Act that 10 million people were unemployed suggest in any way that lengthy delays in paying benefits were contemplated. Under the scheme provided in the Act, no compensation is paid to a worker un-

1. *See* statistical analysis, Appellees Brief at 30.
2. D. C. Code § 46-311(b).

less he has worked for an employer paying taxes into a state unemployment fund. Therefore, those thrown out of work before the bill went into effect could not possibly be covered.[3] Indeed, Congress realized when it passed the Act that unemployment benefits would have no significant effect on the huge unemployment problem created by the economic collapse of the early 1930's. As the House Committee Report states:

> "It should be clearly understood that state unemployment compensation plans made possible by the bill cannot take care of the present problem of unemployment. They will be designed rather to afford security against the large bulk of unemployment in the future." *H. R. Rep.* No. 615, 74th Cong., 1st Sess., 7 (1935).

Congress intended the millions of people out of work at the time of the Social Security Act to be helped not by the unemployment insurance system but by another program, work-relief. *Id.* Thus, the unemployment scheme was not seen as a way out of the 1935 economic crisis and its procedures were not designed to handle an immediate deluge of claims. Rather, by assuring the payment of unemployment benefits during the initial stages of unemployment, Congress meant to prevent such disastrous large-scale unemployment in the future, thereby obviating the necessity for a scheme capable of processing a large proportion of the American work force at one time. *See* Appellees' Brief at 16-19.

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3. The Social Security Act provided, in fact, that no unemployment benefits be paid out until 1938, two years after the first taxes were collected under the program. The purpose of this provision was to assure enough time for sufficient funds to accumulate to place the new program on a sound financial footing. Section 903(a)(2) of the 1935 Social Security Act, 49 Stat. 620, 640. *Statement of Edwin E. Witte, Hearings on H. R. 4120, House of Representatives, Committee on Ways and Means*, 74th Cong., 1st Sess. 157 (1935).

Further, while the brief of the United States asserts that California's median seven week delay is constitutionally permissible and in conformity with the Social Security Act, the present activities of the Secretary of Labor belie that assertion.[4] Under the principle of cooperative federalism as embodied in the Social Security Act, the federal government can impose standards on the states only to assure conformity with the Act. The Secretary has power, then, to shorten the period in which benefits are suspended only if, under the present procedure, benefits are *not* being paid "when due". 42 U.S.C. 503(a)(1). If the Secretary, in fact, makes significant additions to current federal regulatory requirements for state participation in the unemployment compensation program in order to shorten the delay period, he does so only because he considers present delays unlawful. And, as the United States fails to recognize, under *Rosado v. Wyman*, 397 U.S. 397 (1970), the courts have a duty parallel to that of the executive branch to enforce the Social Security Act in an action brought by its beneficiaries when a provision of that Act is being violated.

Since the decision in the court below, California has been paying benefits to all employees found eligible at the initial determination, thus both assuring payment during the initial stages of unemployment and comporting with due process requirements. The United States proposes, however, that California might, if the decision below is affirmed, choose to abandon this efficient method in favor of one less effective but still permissible under the Due Process Clause. (U. S. Brief at 16-17). Yet the possible alternatives suggested by the United States are either not alternatives at all or are clearly prohibited by due process.

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4. U. S. Brief at 14.

Thus, California cannot change to procedures which "automatically set each claim down for hearing (in the absence of waiver by the employer)"[5] or "have the interviewer himself hold a hearing whenever a question of eligibility is raised,"[6] because the system currently employed fits either of these descriptions. Indeed, it is precisely because eligibility determinations are reached only *after* all interested parties have been heard that claimants declared eligible at this stage have an interest in their benefits sufficient to entitle them to procedural due process.

Were California to "refrain from paying benefits until after the employer's time to appeal expired" (U. S. Brief at 16), its procedure would then deprive not only appellees but hundreds of thousands of additional eligible recipients of benefits without due process of law.[7] Due process is violated by Section 1335 not merely because benefits once paid are terminated, but also because benefits found due after a thorough investigation in which both sides are heard are summarily withheld.

Finally, while a system requiring "the interviewer to defer decision and set the case down for hearing before a referee whenever the employer challenges a claim in writing"[8] might in fact be consistent with due process requirements, it would at the same time be completely infeasible administratively and would almost certainly result in a violation of the Social Security Act. In 1969, 99% of those claimants disqualified from receiving benefits because of the reasons they left their last jobs were found ineligible not upon an employer's appeal but at the initial eligibility

5. U. S. Brief at 16.

6. U. S. Brief at 17.

7. In 1968, 401,927 initial eligibility determinations were made in favor of claimants. (A. 105).

8. U. S. Brief at 17.

determination.[9] Were the California legislature to adopt the procedure the United States proposes, it would increase manyfold the burden upon the already overburdened referee system. The cost of hiring the many additional referees needed to make such a system function smoothly could not possibly be justified because the system in effect in California since the decision of the court below processes employers' objections quite efficiently and cheaply.[10] To change the current system in this direction without hiring commensurately more referees would cause lengthy delays before determinations are made, thereby violating the Social Security Act by assuring that benefits are *not* paid "when due"—during the initial stages of unemployment.

In contrast, the payment of benefits pending an employer's appeal *is* administratively and fiscally feasible. The California Unemployment Fund has continued to thrive since the decision of the court below. *See* Appellees' Brief at 54-55. As the United States notes at page 16 of its brief, Rhode Island specifically prohibits the suspension of benefits pending an employer's appeal. R. I. Gen. Laws 28-44-40. Despite this provision, employers are taxed at a lower rate in Rhode Island than in California.[11] From 1950 to 1969,

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9. 139,274 claimants were found ineligible for benefits for leaving their last employment under disqualifying conditions. Only 2,990 (1%) were ruled ineligible by a State referee upon an employer's appeal. J. S., App. C at 14.

10. Under the present procedure, there are only a small number of unrecouped overpayments (*See* Appellees' Brief at 46-47). To add the additional referees necessary to effectuate a system which delays deciding all disputed claims until after a referee's hearing would greatly increase the cost of administering the unemployment compensation program. It is extremely unlikely that this cost would be outweighed by savings of unrecouped overpayments.

11. In 1970, California's employers were taxed at a rate of 2.3% of taxable payrolls and 1.3% of total payrolls. During the same period, Rhode Island's employers were taxed at a rate of 1.8% of taxable payrolls and 1.1% of total payrolls. U. S. Dept. of Labor, Manpower Administration, Unemployment Insurance Program Letter No. 1053, April 20, 1970.

the amount of reserves available for benefits in Rhode Island has risen from $23,171,419.43 to $83,763,392.16. R. I. Dept. of Employment Security, 1969 Statistical and Fiscal Digest, 21.

Thus, the system employed in California since the ruling of the lower court is effective, constitutional and statutorily permissible; all those suggested by the United States are either that same system or are inefficient, unlawful and unconstitutional. It is hard to see, then, how the Court by upholding the decision below would be, as the United States intimates, opening the way for a system *less* beneficial to appellees and other claimants than the one presently provided by the State.

CONCLUSION

For the above mentioned reasons, and the reasons stated in appellees' principal brief, the judgment below should be affirmed.

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